Brief filed as submitted per comms. ruling 7/18/12.

No. 42601-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DUSTIN SHANE IVERSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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I. ISSUES

A. Did the trial court abuse its discretion when it denied Iverson's motion to withdraw his guilty plea?

II. STATEMENT OF THE CASE

On April 8, 2011 Iverson was charged by information in Lewis County Superior Court with five counts of rape of a child in the first degree and five counts of incest in the first degree. CP 1-7. The allegations were that K.S.I., Iverson's biological daughter, disclosed in a taped statement to Lewis County Sheriff's Deputy Shannon that Iverson had placed markers inside of her vagina when she was between the ages of four and eight. CP 8-9. K.S.I. also disclosed that Iverson had penile/vaginal intercourse with her when she was eight and ejaculated on her bedroom floor. CP 9. There was a sexual assault examination done at St. Peter's Sexual Assault Clinic. CP 9. The physical portion of the examination resulted in a finding of physical damage to K.S.I.'s vaginal area. CP 9. K.S.I. told Detective Callas that the rapes occurred just prior to her moving into her current residence on February 3, 1998 and continued every week of every month until Iverson went to in-patient treatment in February 2003. CP 9. K.S.I.'s date of birth is July 22, 1994 and she has never been married to Iverson. CP 8-9.

The events that K.S.I. described happened in Lewis County, Washington. CP 8-9.

The trial court, on April 8, 2011, appointed Daniel Havirco to represent Iverson. CP 12. On April 29, 2011 the State filed a notice of aggravating factors for exceptional sentences. RP 17-18. In its notice the State alleged five aggravating factors:

- The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished;
- The offenses were part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time;
- The current offenses involved domestic violence as defined in RCW 10.99.020 and the offenses were part of an ongoing pattern of psychological, physical, and/or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;
- the defendant used his position of trust or confidence to facilitate the commission of the current offenses;
- the defendant demonstrated or displayed an egregious lack of remorse.

CP 17-18. The State's notice informed the defendant that the State would seek exceptional sentences on all counts. CP 17. On April 29, 2011 the State also extended a plea offer to Iverson. CP 59. The offer required Iverson to plead guilty to two counts of rape of a child in the first degree – domestic violence, without the

aggravating factors. CP 59. On May 5, 2011 the State filed an amended information alleging 12 counts of rape of a child in the first degree. CP 23-34.

There were ongoing plea negotiations between the State and Mr. Havirco. 2RP[1] 30; CP 81. Mr. Havirco met with Iverson in the Lewis County Jail at least six times between April 13, 2011 and June 2, 2011. 1RP 84; Ex. 10.[2] Over those six visits Mr. Havirco spent approximately four hours and 21 minutes with Iverson. Ex. 10. Iverson also was able to speak to Mr. Havirco over the phone. 1RP 82. According to Mr. Havirco, he showed Iverson the discovery, allowed Iverson to read it and read the discovery to Iverson. 1RP 101, 119-21. Iverson denies having access to the discovery materials.[3] 1RP 23. Mr. Havirco also spoke to a number

[1] There are three verbatim report of proceedings the State will be citing to in its brief. 1RP will be the VRP containing the June 2, 2011 change of plea hearing and the August 22, 2011 motion to withdraw guilty plea hearing. 2RP will be the August 24, 2011, day two of the motion to withdraw guilty plea hearing. SRP will be the September 6, 2011 sentencing hearing.

[2] The exhibits admitted during the hearing for the motion to withdraw guilty plea were designated. The State will refer to the exhibits as Ex. and the exhibit number.

[3] It should be noted that Iverson and his family and friends that testified on Iverson's behalf at the motion to withdraw the guilty plea hearing refute and offer a decidedly different set of facts from those stated by Mr. Havirco, Mr. Armstrong and the Findings of Fact entered by the trial court. During its argument section the State will more thoroughly explore the differing versions of the events, and this statement of the case is in no way an attempt to ignore that Iverson presented evidence to support his version of events and disagrees in a number of instances with the facts as presented by the State.

of Iverson's friends and family at Iverson's request. 1RP 91-92, 94, 119-20.

To facilitate further investigation and preparation of Iverson's defense, Mr. Havirco presented a motion to the trial court to authorize investigation services of Jim Armstrong, a private investigator, at public expense. 1RP 85; CP 35-36. The trial court signed an order authorizing Mr. Havirco to retain Jim Armstrong's services on behalf of Iverson. CP 37-38. Mr. Havirco and Mr. Armstrong interviewed K.S.I. and her mother on May 24, 2011. 1RP 85, 87, 2RP 41-42. The interview with K.S.I. lasted approximately 45 minutes, with no breaks. 1RP 125, 2RP 42. Mr. Havirco and Mr. Armstrong left the interview with the impression that K.S.I. came across as credible and she would be a strong witness for the State. 1RP 87-88; 2RP 42. Mr. Havirco and Mr. Armstrong met with Iverson after the interview with K.S.I. to discuss the interview with Iverson, including the substance of the interview. 1RP 86-87; 2RP 27-28, 43; Ex. 10. Iverson denied that Mr. Havirco and Mr. Armstrong informed him of the substance of the interview with K.S.I. 1RP 40, 48. Mr. Havirco stated that he and Iverson had a good working relationship. 2RP 21. Iverson stated he

communicated fine with Mr. Havirco outside of the courtroom. 1RP 39.

After conducting the interview with K.S.I. Mr. Havirco believed, based upon his training and experience, it was in Iverson's best interest to take the plea deal being offered by the State. 1RP 43, 107-08. Mr. Havirco read Iverson the plea offer. 1RP 97. Mr. Havirco discussed the plea offer at length with Iverson. 1RP 94-95. Mr. Havirco explained that Iverson would be required to register as a sex offender for the rest of his life. 1RP 42-43, 97, 2RP 54. Mr. Havirco explained the difference between a straight plea of guilty and an *Alford*[4] plea. 1RP 102-04. Mr. Havirco did discuss other collateral consequences of Iverson pleading guilty including the Indeterminate Sentencing Review Board (ISRB) and sex offender treatment. 2RP 15, 17-18. Mr. Havirco also explained to Iverson he would not qualify for a Special Sex Offender Sentencing Alternative (SSOSA). RP 98, 2RP 10. Mr. Havirco also told Iverson that the decision was ultimately up to Iverson and Mr. Havirco was fine with going to trial if that is what Iverson wished to do. 1RP 41, 2RP 19-20. Mr. Havirco met with Iverson three times after the interview with K.S.I. Ex. 10. Mr.

[4] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Havirco spent approximately three hours with Iverson during these three meetings. Ex. 10. Iverson wanted to take advantage of the plea offer and decided to plead guilty. 1RP 106.[5]

On June 2, 2011 Mr. Havirco met with Iverson in the jail for about 40 minutes prior to the plea hearing. Ex. 10; Supp. CP 6-2-11 Plea Hearing.[6] Mr. Havirco went over the plea offer line by line with Iverson, including the sex offender addendum. 2RP 36. Mr. Havirco asked Iverson if he had any questions regarding the nature of the charges he was pleading to and the elements of the crime the State would have to prove to find Iverson guilty. 2RP 36. Mr. Havirco also asked Iverson if he had any questions about the rights he was giving up by pleading guilty or any questions about the penalties or collateral consequences of pleading guilty. 2RP 36-37. Mr. Iverson did not have any questions and did not express any confusion regarding the plea, the consequences or his rights. 2RP 36-37.[7]

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[5] When called to testify for his motion to withdraw guilty plea Iverson refuted a number of Mr. Havirco's claims regarding thoroughly discussing the plea, collateral consequences and the difference between an *Alford* plea and a straight plea. *See* 1RP 22-37.

[6] The State will be filing a supplemental Clerk's papers designating the minutes from the plea hearing, which shows the hearing occurred at 2:45 p.m. on June 2, 2011.

[7] Again, during his testimony, Iverson disagreed in part with the State's version of Mr. Havirco's dealings with Iverson regarding the plea and plea form. *See* 1RP 33-44.

On June 2, 2011, as part of a plea agreement, the State filed a second amended information charging Iverson with two counts of rape of a child in the first degree – domestic violence. CP 45-47. Iverson signed a Statement of Defendant on Plea of Guilty to Sex Offense (SDPG). CP 48-61. The SDPG listed Iverson's offender score as five and his standard range for count one as 138-184 months and count two as a minimum of 138 months to 184 months with a maximum of life in prison. CP 49. The State's sentencing recommendation is contained on the SDPG and attached to the form. CP 59. Iverson stated by signing the plea form that he was making the plea freely and voluntarily and no one was forcing him to plead guilty. CP 55. Iverson, Mr. Havirco, the deputy prosecutor and the judge all signed the SDPG. CP 55-56. Also attached to the SDPG was the Sex Offender Registration attachment, which notifies Iverson of the sex offender registration requirements he will have to follow as a result of his plea of guilty. CP 57-58.

The trial court conducted a thorough colloquy with Iverson, in which he communicated an understanding of the charges to which he was pleading and the rights he was giving up. 1RP 3-6. The trial court also conducted a lengthy colloquy about the meaning of an *Alford* plea. 1RP 6-11. Iverson pleaded guilty to two counts of

rape of a child in the first degree, domestic violence. 1RP 11. The trial court stated, "[t]he Court finds the defendant is competent to knowingly, intelligently, freely and voluntarily entering into the pleas. The pleas are made on the advice of counsel, with full knowledge of consequences awareness of rights." 1RP 12.

Shortly after pleading guilty Iverson contacted his significant other, Michael Janke. 1RP 35, 55. Iverson told Mr. Janke he was sorry and he had made a mistake by pleading guilty. 1RP 35, 55. Mr. Janke retained the services of Christine Langley on June 13, 2011 on behalf of Iverson. Ex. 9. Ms. Langley's services were retained to facilitate a possible motion to withdraw Iverson's guilty plea. 2RP 49-50. A motion to withdraw guilty plea was filed on Iverson's behalf by Ms. Langley on July 25, 2011. CP 72-75. A hearing for the motion took place on August 22, 2011 and was continued on August 24, 2011. 1RP 16, 2RP 1. The trial court heard from Iverson, Mr. Janke, Rose Iverson and Leona Lester, who all testified on Iverson's behalf. 1RP 19, 50, 56, 65. The State introduced testimony from Mr. Havirco and Mr. Armstrong. 1RP 75, 2RP 3, 39. There were ten exhibits entered into evidence at the hearing. Ex. 1-6, 8-11. Iverson argued that Mr. Havirco had not fully informed him of all of the consequences of pleading guilty, the

difference between an *Alford* plea and a straight plea, Iverson's ineligibility for a SSOSA and had failed to adequately investigate the case against Iverson. *See* 1RP 19-50; 2RP 51-60. The trial court denied Iverson's motion and findings of facts and conclusions of law were entered. SRP 3-5; CP 78-82.

Iverson was sentenced on September 6, 2011 and timely appeals the trial court's denial of the withdrawal of his guilty plea. SRP 7-24; Supp. CP Notice of Appeal.[8]

The State will supplement the facts as needed throughout its brief.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED IVERSON'S MOTION TO WITHDRAW HIS GUILTY PLEAS AND SENTENCED IVERSON FOR THE TWO COUNTS OF RAPE OF A CHILD IN THE FIRST DEGREE.

After a defendant enters a guilty plea in the trial court, he or she may motion the court to be allowed to withdraw the guilty plea. *See* CrR 4.2(f). A trial court then determines if it should allow the plea to be withdrawn due to a manifest injustice. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). Manifest injustice has

[8] The State will be including in its supplemental Clerk's papers the notice of appeal, which appears to have been inadvertently left out of Iverson's designation.

been defined by a list of four, nonexclusive, factors including, "(1) the plea was not ratified by the defendant, (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept." *State v. Zhao*, 157 Wn.2d at 197.

In Iverson's case he is claiming that the trial court erred when it denied his motion to withdraw his guilty plea. It appears Iverson's claims fall primarily under the ineffective assistance prong of manifest injustice and bleeds over to the voluntary prong. *See* Brief of Appellant 11-22.[9] Iverson also attacks the sufficiency of the evidence the trial court relied upon in determining the findings of facts and its ruling that Iverson had effective counsel and Iverson's plea was knowingly, voluntarily and competently made. *See* Brief of Appellant 13. The State will break its argument into four sections, (1) ineffective assistance of counsel, (2) the voluntariness of the plea, (3) sufficiency of evidence to support the trial court's findings and (4) that Iverson did not meet his burden to show his guilty plea should be withdrawn to correct a manifest injustice.

[9] Due to the lack of internal structure within the argument portion, minimal case citation and inconsistent citations to the record for the facts the State is attempting to frame its argument section in a manner that responds to what the State believes are Iverson's arguments.

1. Iverson Received Effective Assistance From His Trial Counsel.

Mr. Havirco met with Iverson several times, spoke to Iverson's friends and family on multiple occasions, hired an investigator, interviewed the victim, K.S.I., and her mother and negotiated the case with the State. 1RP 51, 60-61, 66, 81-82, 85, 91-92, 94, 2RP 20; Ex. 10; Supp. CP Motion for Payment of Attorney Services (MPAS).[10] While Iverson disputes many of Mr. Havirco's assertions regarding the work done on Iverson's behalf, those disputes are without merit and as argued below, Mr. Havirco's representation did not fall below the standards for defense counsel.

To prevail on an ineffective assistance of counsel claim Iverson must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct

[10] The State in its supplemental designation of Clerk's Papers will also be designating Mr. Havirco's Motion for Payment of Attorney Services. It should be noted that there appear to be some minor discrepancies between the dates on the invoice and Ex. 10, the jail log, it is not clear if this an attorney error or jail error.

was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Mr. Havirco was appointed to represent Iverson on April 8, 2011. CP 12. Mr. Havirco met with Iverson on April 13, 2011 for over 20 minutes at the Lewis County Jail. Ex. 10; Supp. CP MPAS. This meeting was prior to Iverson's arraignment, which was held on April 14, 2011. CP 13. According to the jail visitation summary report, Mr. Havirco went to visit Iverson in the Lewis County Jail on April 21, 2011, April 27, 2011, May 9, 2011, May 26, 2011, June 1,

2011 and June 2, 2011. Ex. 10. The total time spent according to the visitation summary report was four hours and 21 minutes. Ex. 10; Supp. CP MPAS. There is one date, April 21, 2011 that no out time is noted on the jail summary. Ex. 10.

Mr. Havirco spoke to Iverson's significant other, Mr. Janke, in regards to Iverson's case. 1RP 52, 119-20, 91. Mr. Janke also provided Mr. Havirco with court documents from Iverson's divorce proceedings with K.S.I.'s mother. 1RP 52. Mr. Havirco spoke to Iverson's mother, Rose Iverson on several occasions. 1RP 60-61, 91. Mr. Havirco also corresponded with Leona Lester in regards to Iverson's case. 1RP 66, 91-92. Mr. Havirco received email correspondence, a written statement and spoke to Ms. Lester at least once over the phone. 1RP 66, 91-92. Mr. Havirco asked Iverson's friends and family to provide any information that may be helpful in putting together a defense for Iverson. 1RP 91. According to Mr. Havirco,

> I received some [information] that was not particularly relevant, but I was really just trying to be as open minded as I could and accommodating as I could to find out what if anything they might know or heard of, so most of what I received was nothing that was going to be really germane to the case, but certainty wasn't harmful.

1RP 91. Mr. Havirco was provided a DVD by Iverson's friends and family of K.S.I. at a family gathering with Iverson about 13 years ago. 1RP 92, 130. Family and friends kept requesting the "discovery book" from Mr. Havirco. 1RP 51, 59, 67-68. It appears that Iverson's family was under the impression they could get a copy of the discovery and give it to Iverson. 1RP 51, 67-68.[11]

Iverson testified that he was never able to look at or read through the discovery materials in his case. 1RP 23, 48. Iverson asserted that Mr. Havirco told Iverson that Mr. Havirco would make a copy of the police reports and leave them in booking at the Lewis County Jail for Iverson. 1RP 48.[12] Mr. Havirco contradicted Iverson's version of events in regards to discovery when he stated he allowed Iverson to look at the discovery materials and read the materials to Iverson. 1RP 101-01, 119-21. The discovery was not particularly thick and Mr. Havirco prefers to read the discovery to his clients to get a contemporaneous and/or spontaneous response from them. 1RP 120-21.

Mr. Havirco presented a motion to the trial court for authorization to hire a private investigator at public expense. CP

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[11] Any discovery given to an attorney is to remain in the exclusive custody of the attorney unless the parties or the court decide otherwise. *See* CrR 4.7(h)(3).

[12] Without proper redaction and agreement from the prosecutor and the court it would be a violation of CrR 4.7(h)(3) to give Iverson a copy of the police reports.

35-36. This motion was granted and Mr. Havirco hired Jim Armstrong to help in preparing a defense for Iverson's case. 1RP 85, 2RP 40-41; CP 37-38. Mr. Armstrong has 20 years of experience in investigating criminal cases for the defense. 2RP 39. Mr. Armstrong investigates approximately 100 cases a year and 20 to 25 percent of those cases involve sexual abuse allegations. 2RP 40. Out of the cases involving sexual abuse, Mr. Armstrong sits in on the interview with the victim in 95 percent of those cases. 2RP 40. That would be the equivalent to approximately 19 victim interviews a year.

Mr. Havirco and Mr. Armstrong interviewed the victim, K.S.I., for approximately 45 minutes on May 24, 2011. 1RP 85, 87, 125, 2RP 42. Mr. Havirco made a tactical decision not to get overly specific in the questions he asked K.S.I. especially in regards to any inconsistencies in K.S.I.'s statements. 2RP 46-48. After the interview Mr. Havirco and Mr. Armstrong felt that K.S.I. was a strong witness for the State and would present well to a jury. 1RP 87-88, 90-91, 2RP 42. Mr. Havirco and Mr. Armstrong went to the Lewis County Jail and spent approximately 50 minutes with Iverson, sharing the information they collected from interviewing K.S.I. 2RP 27-28, 43; Ex. 10. Mr. Havirco and Mr. Armstrong

discussed not only the substance of what K.S.I. said but also her demeanor and credibility. 1RP 86-87, 2RP 27-28, 43; Ex. 10.[13] Iverson disputes that Mr. Havirco told him anything regarding the substance of the interview with K.S.I. 1RP 40, 48. Iverson did admit that Mr. Havirco and Mr. Armstrong told him that K.S.I. did come across as credible. 1RP 40.

The plea offer from the State was extended to Iverson on April 29, 2011. CP 59. The plea required Iverson to plead guilty to two counts of rape of a child in the first degree – domestic violence. CP 59. The plea also required the parties to agree to high end of the standard minimum range, 184 months. CP 59. The plea offer form also included the information that there were a minimum and maximum terms, the community custody on count II was life, evaluation and treatment for sexual deviancy along with other conditions. CP 59. Mr. Havirco could not negotiate a lesser sentence from the deputy prosecutor handling the case. 2RP 31. Mr. Havirco recalled the deputy prosecutor felt strongly about the case and was already giving quite a deal away by agreeing to dismiss 10 of the 12 counts charged in the amended information. 2RP 31. Ultimately, Mr. Havirco was able to negotiate an

[13] On May 26, 2011 the jail visitor summary shows a 49 minute visitation.

agreement that he could argue for low end of the minimum/standard range instead of agreeing to high end. 1RP 7.

Due to the nature of the charges, the amount of time Iverson was looking at spending in prison and the fact that Iverson maintained his innocence, Iverson was not eligible for a SSOSA. 1RP 98-99, 2RP 10, 30. Mr. Havirco explained to Iverson that he would not be eligible for a SSOSA. 2RP 10-11, 30. Iverson claims that Mr. Havirco never brought up the subject of SSOSA with Iverson. 2RP 52-53. Yet, when being question by the judge regarding whether or not Mr. Havirco told him about SSOSA, Iverson stated, "[h]e told me that I couldn't do that [SSOSA], because I say I'm innocent that they have to have things to go by." 1RP 47. Iverson understood that to be eligible for a SSOSA he would have to admit he committed a crime, which he was not willing to do. 1RP 47.

Mr. Havirco presented Iverson with his options regarding pleading guilty, the difference between a straight plea and an *Alford* plea, or taking the case to trial. 1RP 45, 95-97, 102-06, 2RP 19-20. According to Mr. Havirco, Iverson understood the difference between an *Alford* plea and a straight plea and new that he was more likely to get high end of the range if he chose to plead guilty

via an *Alford* plea. 1RP 104-05, 2RP 21. Mr. Havirco discussed the amended information with Iverson, including the aggravating factors. 1RP 83. Mr. Havirco also discussed that there was physical findings that supported K.S.I.'s allegations of abuse and that the physical finding was significant in this case. 1RP 83, 2RP 29.

Mr. Havirco told Iverson that after interviewing K.S.I., it was Mr. Havirco's professional opinion that Iverson should take the plea deal over risking what could likely be a 40 year sentence due to the aggravating factors. 1RP 107-08. Mr. Havirco also told Iverson that the ultimate decision was up to Iverson and Mr. Havirco did not have any problem taking the case to trial. 2RP 19-20.

Iverson's testimony at the hearing to withdraw his guilty plea disagreed in many parts with Mr. Havirco's recall of the events regarding the explanation of Iverson's options and what a guilty plea entailed. Iverson said he thought an *Alford* plea was different than saying you are guilty. 1RP 30-31. Iverson claimed that he did not realize that an *Alford* plea was the same as a guilty plea until he was walking out the door of the courtroom after pleading guilty by *Alford* plea. 1RP 33. Iverson did agree that Mr. Havirco made it

clear to Iverson that the final decision regarding whether to plead guilty was ultimately Iverson's. 1RP 41.

Iverson also made other contradictory remarks regarding his relationship with his attorney and the information Mr. Havirco relayed to Iverson. Iverson asserted at one point that he was told by Mr. Havirco that he would only have to register as a sex offender for a year or two. 1RP 31. But on two other occasions during the hearing Iverson acknowledged that he knew prior to pleading guilty that he would have to register as a sex offender for the rest of his life. 1RP 42-43, 2RP 54. Iverson during his rebuttal testimony stated that Mr. Havirco started pushing a plea deal right at the beginning of the case, from their first meeting. 2RP 56. Yet during his direct examination he stated that at the beginning of the case Mr. Havirco told not only Iverson but Iverson's friends and family that he had a good chance at winning this case. 1RP 22. Iverson stated that Mr. Havirco's attitude changed after Mr. Havirco interviewed the witnesses and that is when Mr. Havirco told Iverson that a plea was his best option. 1RP 24, 43. This statement is corroborated by Rose Iverson, who spoke to Mr. Havirco on several occasions regarding her son's case. 1RP 60-61. According to

Rose,[14] Mr. Havirco had never told Rose that he believed Iverson should take a plea deal until May 27, 2011. 1RP 60-61. Mr. Havirco told Rose that K.S.I. was convincing and Iverson should take the plea deal being offered by the State. 1RP 58. Further, the State did not extend its plea offer to Iverson until after Iverson had met with his attorney at least twice in the jail and had two court appearances with Mr. Havirco. CP 8, 9, 10; Ex. 10; Supp. CP MPAS.

Iverson ultimately decided to take the State's offer and plead guilty to two counts of rape of a child in the first degree – domestic violence, without the aggravating factors. 1RP 25, 27; CP 48-61. Mr. Havirco went over the plea with Iverson, went through the SDPG line by line with Iverson prior to the court hearing. 2RP 22, 36. Mr. Havirco met with Iverson down in the Lewis County Jail for 45 minutes prior to the plea hearing. Ex.10. Mr. Havirco went over the sex offender registration appendix, although he admitted he overlooked having Iverson sign the form. 2RP 22, 36. Mr. Havirco asked Iverson if he had any questions regarding what Iverson was pleading guilty to, the elements of the offense, the supervision, costs, fees and other collateral consequences of pleading guilty.

[14] The State is referring to Rose Iverson by her first name to avoid confusion due to her same last name as the defendant. No disrespect is intended.

2RP 15, 17-18, 36-37. Iverson had been fully informed about the ISRB and how that affected his release. 1RP 96, 2RP 17-18.

Again, Iverson refutes that Mr. Havirco went over the plea statement with him. 1RP 43-44. Iverson said he also never read the plea statement. 1RP 43-44. It would be interesting to know what Iverson would say did happen during the 45 minute meeting that occurred an hour before he pleaded guilty to the charges outlined in the second amended information. Supp. CP 6-2-11 Hearing; Ex. 10.

Mr. Havirco testified that he spent approximately 40-50 hours preparing and investigating this case. 2RP 23. The billing invoice Mr. Havirco submitted to the trial court for reimbursement of his services calculates 33.5 hours that he billed for. *See* Supp. CP MPAS. In reviewing the invoice it is clear that there was time spent working on Iverson's case that are missing from the invoice. Mr. Havirco did not bill for any conversations, whether in person or over the phone with Iverson's family. Supp. CP MPAS. There is no itemized billing for the time spent interviewing K.S.I. or her mother. Supp. CP MPAS. While it is somewhat puzzling why Mr. Havirco did not bill for these services, it is well documented through the testimony of people other than Mr. Havirco that Mr. Havirco spoke

to Rose numerous times, spoke to Mr. Janke and Ms. Lester and interviewed K.S.I. and her mother. *See* 1RP 51-52, 60-61, 66-68, 2RP 41-42.

Iverson also argues that it is unbelievable that with Mr. Havirco's case load for his municipal court contracts he would have an adequate time to prepare for this case. Brief of Appellant 14-15. While Mr. Havirco does have a significant municipal court case load, he easily explained the lack of complexity of the cases, which were predominantly driving while license suspended cases, the rarity at which cases go to trial or motions need to be filed and how he never had an issue performing a superior court felony trial due to his commitments to his municipal court defense contracts. 1RP 109-116. The billing statement and testimony show that Mr. Havirco had ample time to work on Iverson's case.

Iverson argues to this court that his attorney was ineffective because he did not interview every witness on the witness list, hire an expert regarding K.S.I.'s delayed disclosure of abuse or try to interrogate K.S.I. regarding inconsistent statements. *See* Brief of Appellant. Iverson further asserts that the assistance provided by his friends and family was not properly used by Mr. Havirco in preparing Iverson's case. Brief of Appellant 17-18. Finally, Iverson

contends that he was pressured into pleading guilty and was not informed of all the direct and collateral consequences of entering pleas of guilty to the charges. Brief of Appellant 21. Throughout much of Iverson's argument portion he fails to cite to the record for his assertions of the facts in this case. Neither this Court nor the State is required to comb the record looking for support for Iverson's arguments. *See State v. Brousseau,* 172 Wn.2d 331, 353, 259 P.3d 209 (2011).[15]

Iverson had not met his burden to show the performance of his trial counsel, Mr. Havirco, was deficient. Iverson may not have liked Mr. Havirco's opinion of the case, but that does not mean Mr. Havirco did not take adequate time to evaluate the case and give Iverson an informed opinion regarding Iverson's options. 1RP 41-42. Mr. Havirco explained why he did not interview all of the witnesses on the State's witness list, especially the professional witnesses who made reports which were reduced to writing. 2RP 8-9, 23-24. The key witnesses for the State's case were interviewed, with an investigator present. 1RP 122-23, 2RP 41-42. Mr. Havirco did not conduct a deposition because under the criminal rules a deposition can only be ordered if a witness refuses

[15] Regardless, the State is doing its best to respond to Iverson's briefing despite the lack of citations, both factually and case authorities.

to discuss the case with counsel and requires an order from the court. CrR 4.5. Further Mr. Havirco evaluated the information and documents given to him by Iverson's friends and family and found much of it to be irrelevant or inadmissible. 1RP 91-92, 130. The rumor that K.S.I. had been molested by another family member would not be relevant or admissible. RCW 9A.44.020; ER 401, ER 402, ER 403. The evidence provided of home movies from 13 years ago are equally irrelevant or would be found by the trial court to be a waste of time. ER 401, ER 402, ER 403.

Mr. Havirco spent time with Iverson, evaluated the case, interviewed the crucial witnesses, spoke to Iverson's friends and family, fully explained Iverson's options, gave Iverson an informed opinion of the case, which included Iverson's chances at trial. Mr. Havirco also made it clear to Iverson that it was Iverson's decision whether or not to plead guilty or take the case to trial and Mr. Havirco was ready to take the case to trial if that is what Iverson decided he wanted to do. Iverson refutes his attorney fully informed Iverson of the plea information, the collateral consequences or allowed Iverson to look at or read the discovery or inform Iverson of the substantive information from the interview with K.S.I. Yet, both Mr. Havirco and Mr. Armstrong testified that they

met with Iverson and talked about the interview, both the credibility of the witness and her statements. The visitation summary shows numerous visits, in particular one on May 9, 2011 that was about an hour long, which would be enough time to go through the discovery with Iverson. *See* Ex. 10.

Mr. Havirco adequately prepared Iverson's case, his conduct was reasonable and did not fall outside the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 688-90. Therefore, Mr. Havirco effectively represented Iverson and Iverson's claim of ineffective assistance of counsel fails. The trial court correctly ruled that Iverson did not show that Mr. Havirco's representation was deficient and Mr. Havirco provided effective assistance of counsel to Iverson. CP 82.

2. Iverson's Plea Was Voluntarily Made.

Mr. Havirco's testimony regarding the in depth process he used to ensure that Iverson was fully informed about the risks, consequences and benefits of pleading guilty, coupled with the trial court's extensive colloquy are proof that Iverson's plea was voluntarily made. Iverson argues to this Court that his pleas of guilty to two counts of rape of a child in the first degree – domestic violence were not voluntarily made because he was not fully

informed of all of the direct and collateral consequences of the plea. Brief of Appellant 19-22. Iverson contends that Mr. Havirco pushed him into pleading guilty and had Iverson been fully informed and not been coerced by his attorney he would not had pleaded guilty. Brief of Appellant 18-22.

Guilty pleas may only be accepted by the trial court after a determination of the voluntariness of the plea is made. CrR 4.2(d). Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citations omitted). The court rule requires a plea be "made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). Prior to acceptance of a guilty plea, "[a] defendant must be informed of all the direct consequences of his plea." *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations omitted). A defendant need not show a direct consequence in which he or she was uninformed about was material to his or her decision to plead guilty. *In re Isadore*, 151 Wn.2d 294, 301, 88 P.3d 390 (2004).

"An *Alford* plea is valid when it 'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1992). The signature of a defendant on the statement of defendant on plea of guilty form is strong evidence of the plea's voluntariness. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

> When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.

State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citations omitted). To meet his or her burden that a guilty plea was not voluntarily made, a defendant must present some evidence of involuntariness beyond his self-serving allegations. *State v. Osbourne*, 102 Wn.2d 87, 97, 684 P.2d 683, 690 (1984).

If the technical requirements of CrR 4.2(g) are not adhered to, that in and of itself does not mean a manifest injustice was committed. *State v. Branch*, 129 Wn.2d at 642. The heavy burden placed upon defendants to satisfy the requirements of CrR 4.2(f)

are not met by showing that the error, was at most, a technical error committed when the plea was taken. *State v. Osborne*, 35 Wn. App. 751, 759, 669 P.2d 905 (1983), *aff'd*, 102 Wn.2d 87, 684 P.2d 683 (1984), (citations omitted).

> The constitution does not require that the defendant admit to every element of the charged crime. An information which notifies a defendant of the nature of the crime to which he pleads guilty creates a presumption that the plea was knowing, voluntary and intelligent. A defendant is adequately informed of the nature of the charges if the information details the acts and the state of mind necessary to constitute the crime. In addition, a court may examine written statements to ascertain the defendant's understanding of the charges and may rely on the defendant's plea statement.

In re Ness, 70 Wn. App. 817, 821, 855 P.2d 1191, 1194 (1993).

In *Osbourne*, the Washington Supreme Court upheld a denial of a motion to withdraw a guilty plea and ruled that the Defendants were made sufficiently aware of the nature of the charge against them despite the fact that the Defendants were not specifically apprised of an element of the crime to which they plead:

> Petitioners argue that they were unaware at the time their pleas were taken that the State had to prove the "knowledge" element common to these alternative methods of proving the underlying felony. It is true that petitioners were not specifically advised during the plea proceedings that knowledge is an essential element of the underlying felony of second degree assault. Nevertheless, we are not convinced that petitioners' pleas were made absent an understanding of the nature of the charge. It is clear from

> the record that petitioners were, at the time their pleas were taken, aware of facts gathered by the State from which a trier of fact could easily find the requisite "knowledge".

Osbourne, 102 Wn.2d at 93-5.

The trial court conducted a thorough colloquy with Iverson, in which he communicated an understanding of the charges to which he was pleading and the rights he was giving up. 1RP 3-6. The trial court also conducted a lengthy colloquy about the meaning of an *Alford* plea. 1RP 6-11. Additionally, Iverson has prior experience with the criminal justice system, including the process utilized and consequences of pleading guilty. Ex. 1, 2, 3, 4. Iverson on four separate occasions pleaded guilty on criminal matters. Ex. 1, 2, 3, 4. This includes misdemeanor cases in Lewis and Thurston County district courts, a juvenile case in Lewis County Juvenile Court and a prior felony from 2009 in Lewis County Superior Court. Ex. 1, 2, 3, 4. Additionally Mr. Havirco represented Iverson on the 2009 felony. 1RP 21; Ex. 2.

Mr. Havirco went over the plea form, line by line with Iverson. 2RP 22, 36. As argued above, Mr. Havirco stated he went through all of the consequences Iverson was facing by pleading guilty, including the IRSB, lifetime registration, minimum and maximum sentence, the potential for a higher sentence with an

Alford plea and Iverson's ineligibility to qualify for SSOSA. 1RP 96, 98, 102-04, 2RP 10, 15, 17-18. Page 8 of the SDPG contains the following:

> 7. I plead guilty to:
> count 1 Rape of a Child in the First Degree, count 2 Rape of a Child in the First Degree in the second amended information. I have received a copy of that Information.
>
> 8. I make this plea freely and voluntarily.
>
> 9. No one has threated harm of any kind to me or to any other person to cause me to make this plea.
>
> 10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.
>
> 11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: Alford plea to both counts.
> [X] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.
>
> 12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 55. Iverson signed the SDPG as did his attorney, the deputy prosecuting attorney and the judge. CP 55-56.

On June 2, 2011, in open court, the trial court judge had the following colloquy with Iverson:

> Q. Mr. Iverson, I'm told by the attorneys that it's your intent this afternoon to enter pleas of guilty to Counts I and II of the Second Amended Information charging you with Rape of a Child in the First Degree Domestic Violence, Count I, and Rape of a Child in the First Degree Domestic Violence, Count II, that you intend to enter these pleas, pursuant to what's referred to as an Alford or Newton doctrine. Is that what you plan on doing this afternoon?
>
> A. Yes.
>
> Q. You understand that I'm not obligated or required to accept whatever it is that's recommended, as far as sentence. I could sentence you to the maximum for these particular crimes. The maximum for these particular crimes is life in prison and/or a $50,000 fine. You understand that?
>
> A. Yes.
>
> Q. Now, also, you understand that inasmuch as these pleas are being proffered pursuant to the Alford or Newton doctrine, the Court may not sentence you to any kind of special sex offender alternative or SSOSA sentence that those are not possible for somebody who enters a plea pursuant to the Alford or Newton doctrine. You understand that?
>
> A. Yes.
>
> Q. Mr. Havirco I'm certain has reviewed with you the Statement of the Defendant on Plea form. This form contains a complete listing of your rights relative to trial. Do you have any questions about the rights that are set forth or enumerated on the form?
>
> A. No.

Q. You understand that if I accept a plea of guilty that you are going to be giving up certain rights that are set forth on the form. They'll be no trial. They'll be no trial by jury. You are not going to have the opportunity to challenge, confront, cross-examine and question witnesses called to testify against you, because with no trial, no witnesses are going to be called. You are not going to have the opportunity to present testimony and evidence on our own behalf. You are not going to be presumed innocent. You are not going to have the right to remain silent.

Most importantly they'll be no right to appeal. All those rights are waived given up with a plea of guilty. Do you understand that?

A. Yes

Q. Rights that you have left include the right to present, which you are, and the right to be represented by counsel, and Mr. Havirco is with you. Any question about that?

A. No.

Q. How old are you?

A. Thirty-five.

Q. What was the last grade you finished school?

A. Seven.

Q. Do you have any difficulty reading, writing or understanding the English language?

A. No.

Q. Do you understand the charges in Counts I and II of the Second Amended Information filed today?

A. Kind of, yeah.

Q. What do you mean by "kind of"? You do not understand what they are?

A. Yes.

Q. Do you need me to read those charges to you this afternoon in open Court?

A. No.

...

Q. You understand that what I'm going to ask the prosecuting attorney at this point is to tell me on the record what evidence the State would have presented, if this matter had gone to trial relative to these two charges. When the prosecutor is done telling me what the State's evidence is, I'm going to ask you two questions: Number one, I'm going to ask you if you agree that what Mr. Hayes tells me is the evidence that the State would present, if the matter were to go to trial.

Secondly, I'm going to ask if you agree that if a judge or jury heard that evidence and chose to believe that evidence, not necessarily all the evidence, but that evidence, it's highly likely that a judge or a jury would find beyond a reasonable doubt that you are in fact guilty of the two counts of Rape of Child in the Frist Degree Domestic Violence as set forth in Counts I and II. I'm not going to ask you to admit to me that the conduct constitutes the crimes, but I'm going to ask you those two questions. You understand that?

A. (Inaudible)

Q. You understand that?

A. Yes.

...

Q. You agree, Mr. Iverson, that's the evidence the State would present, if the matter were to go to trial?

A. Yes.

...

Q. You agree if a judge or jury heard that evidence, coupled with what's in the Probable Cause Statement, it's highly likely that a judge or jury would find beyond a reasonable doubt that you are guilty of at least two counts of Rape of a Child in the First Degree Domestic Violence, as set forth in the Second Amended Information?

A. Yes.

Q. So you are pleading guilty to pursuant to the Alford or Newton plea to take advantage of the plea offer, which among other things eliminates the other ten charges in the original Amended Information, and secondly, you understand the State's recommendation, as far as the sentence is concerned is going to be with a standard range of lifetime supervision and natural confinement range of 138 to 184 months on each, the 36 months of community custody thereafter. The State is going to recommend the high end of the sentencing range, which is lifetime supervision and 184 months of actual confinement, and as I understand what Mr. Havirco said you are free to argue anywhere within the standard range. Do you understand that?

A. Yes.

Q. But you understand that pleading guilty to a class A sex offense, number one, you are a sex offender for the rest of your life, which means you have to register, secondly, that you are under lifetime supervision by the Department of Corrections or its subsequent agency. You understand that?

A. Yes.

Q. There's no getting out of that, no relief from that. Do you understand that?

A. Yes.

Q. So lest there be any misunderstanding, your plea to Counts I and II pursuant to the Alford or Newton doctrine is guilty of Rape of a Child First Degree Domestic Violence; correct?

A. Yes.

Q. Do you have any questions?

A. No.

1RP 3-11. The State summarized its evidence, as found in the declaration of probable cause. 1RP 8-9; CP 8-10. This evidence, as conveyed to Iverson in open court, was clear as to what actions the State was alleging Iverson committed that constituted the charges in Count I and II of the amended information. 1RP 8-9. The trial court found that Iverson's plea was made knowingly, voluntarily, intelligently and freely, upon the advice of counsel with full knowledge of the consequences and his rights. 1RP 12.

After the plea hearing Iverson immediately called Mr. Janke stating he had made a mistake pleading guilty and he was sorry. 1RP 35, 55. Iverson did employ new counsel within two weeks to aid him in attempting to withdraw his guilty plea. 2RP 9-50; CP 72-75. Among the allegations were that Iverson was not fully informed

of the consequences of pleading guilty by an *Alford* plea. CP 74. The only evidence of this is Iverson's own self-serving statements that he did not fully understand all of the consequences of entering an *Alford* plea.

It has been held by courts that when a defendant is misinformed regarding additional consequences of an *Alford* plea "it **may** be manifestly unjust to hold the defendant to his earlier bargain." *State v. Stowe*, 71 Wash. App. at 187-88 (emphasis added). In Iverson's case he was fully informed of the consequences of his plea, which is evidenced by Mr. Havirco's testimony, the SDPG and the colloquy with the judge during the plea hearing. While a court **may** find it is manifestly unjust to hold a defendant to his guilty plea when he was not apprised of all of the consequences, the only evidence presented that Iverson was not informed about the direct and collateral consequences of pleading guilty is his own self-serving testimony, which at times contradicts itself.[16] Iverson's pleas were made knowingly.

[16] See previous section regarding whether or not trial counsel informed Iverson that his pleas would result in lifetime registration as a sex offender.

3. The State Presented Sufficient Evidence To Support The Trial Court's Findings Of Fact And Conclusions Of Law.

Iverson structures his argument to this Court in an almost identical fashion to the Supreme Court's opinion in *State v. A.N.J.* See Brief of Appellant. Iverson attacks the sufficiency of the evidence the trial court relied upon for some of its findings of facts and conclusions of law. Brief of Appellant 13. Iverson's argument fails because there was sufficient evidence admitted to support all of the findings of facts and therefore the trial court's conclusions of law.

Findings of fact entered by a trial court after a hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill,* 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." *Id.* Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing

inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson,* 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

Iverson does not specifically assign error to any of the findings of fact but does argue the trial court erred in making five findings that he alleges are not supported by the evidence. *See* Brief of Appellant 13-14. Iverson argues the following findings were not supported by substantial evidence:

> (1) Mr. Havirco allowed Iverson to personally read the discovery,
> (2) Mr. Havirco spent 40 to 50 hours on Iverson's case,
> (3) Mr. Havirco advised Iverson a guilty plea would encompass:
> (i) an indeterminate life sentence,
> (ii) lifetime sex offender registration, and
> (iii) lifetime community custody.

Brief of Appellant 13-14. After reviewing the findings of fact and conclusions of law it appears to the State that Iverson is attempting to assign error to findings 1.13, 1.18, 1.21 and 1.26. There are other findings that may encompass some of Iverson's argument but

it is difficult to ascertain exactly which findings Iverson is objecting to due to the lack of citation. It is further difficult to respond to Iverson's arguments regarding the facts in dispute due to his repeated failure to cite to the record.

The evidence presented regarding Mr. Havirco's representation of Iverson is discussed at length above in subsection one of this response brief.[17] Iverson, his mother, Rose, Iverson's significant other, Mr. Janke and a former in-law and family friend, Ms. Lester, testified on behalf of Iverson during the hearing on Iverson's motion to withdraw his guilty plea. *See* RP 19, 50, 56, 65. The State elicited testimony from Mr. Havirco and Mr. Armstrong in support of its position that the trial court should deny Iverson's motion to withdraw his guilty plea. 1RP 75, 2RP 3, 39. The trial court judge who heard the motion was also the judge who took Iverson's guilty plea. 1RP 1, 46.

Iverson's contention that Mr. Havirco was ineffective is, as argued above, without merit. Iverson complains to this Court that "the trial court accepted as true all of the evidence provided by the

[17] The State is attempting not to completely repeat all of the evidence it thoroughly went through in subsection one due to space constraints and its belief that the Court can reference subsection one if it wishes to review the more thorough discussion of the evidence regarding ineffective assistance of counsel. If this Court would prefer a more in depth argument the State would happily respond to any request from this Court for supplemental briefing if this Court were to find such briefing helpful.

state…completely discounted the testimony of Mr. Iverson and his family members; and ignored the inconsistencies in Mr. Havirco's testimony. Brief of Respondent 13. While the State admits that Mr. Havirco's recollection of some of the facts of the case were a bit uncertain at times, his recollection of the nuts and bolts of his representation of Iverson was not inconsistent. Iverson, in his briefing, does exactly what he accuses the trial court of doing; he ignores the inconsistencies in his own testimony.

There are multiple instances throughout Iverson's testimony where he makes contradictory statements. At one point during Iverson's testimony he stated he was never informed that he would have to register as a sex offender for the rest of his life. 1RP 31. Iverson later admitted that he knew prior to pleading guilty he would have to register as a sex offender for the rest of his life. 1RP 42-43, 2RP 54. Iverson argues that Mr. Havirco never informed him about SSOSA and he did not realize he would not be eligible for SSOSA sentence. 2RP 52-53. Iverson testified that Mr. Havirco had explained to him that Iverson did not qualify for a SSOSA. 1RP 47, 2RP 53. Iverson stated that he met with Mr. Havirco probably three or four times to prepare his case while the jail visitation log he asked to be admitted into evidence showed at least six visits from

Mr. Havirco. 1RP 25; Ex. 10. Iverson stated Mr. Havirco never told him any of the substantive details of Mr. Havirco's interview with K.S.I. 1RP 40. Mr. Armstrong and Mr. Havirco testified that they met with Iverson together, down in the jail, and went over the substance of the interview with K.S.I. and their opinion of her as a witness for the State. 1RP 86-87, 2RP 27-28, 43. Iverson claimed he did not understand that an *Alford* plea was a guilty plea, yet his colloquy with the trial court suggests otherwise. *See* RP 3-11. Iverson also testified that Mr. Havirco pushed the plea deal on Iverson from his first meeting with Iverson. 2RP 56. This was contradicted by Iverson's testimony that at the beginning of the case Mr. Havirco told Iverson that he had a good chance of winning the case. 1RP 22.

The trial court is in the best position to weigh the credibility of witnesses and the appellate court defers to the trial court regarding the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App at 618. In this case the trial court found Mr. Havirco, Mr. Armstrong and the record from the guilty plea proceedings more credible than Iverson and his witnesses. There was substantial evidence submitted to the trial court that Mr. Havirco allowed Iverson to read the discovery and

that Mr. Havirco read the discovery to Iverson. 1RP 101-01, 119-21; Ex. 10. It is curious to the State that Iverson and his witnesses kept asserting that Mr. Havirco told them he would get them a copy of the "discovery book" when such an action is prohibited under the discovery rules. *See* CrR 4.7(h)(3). The trial court judge picked up on this when he asked Iverson, "But he [Mr. Havirco] didn't tell you by law he couldn't make you a copy of them [the police reports]?" 1RP 48.

There was substantial evidence presented that Mr. Havirco spent 40 to 50 hours on Iverson's case. Mr. Havirco estimated he spent between 40 and 50 hours on Iverson's case. 2RP 23; CP 80. Iverson presented no evidence to the trial court to refute this assertion by Mr. Havirco. Iverson argues to this Court that due to his other obligations, it was improbable if not impossible for Mr. Havirco to spend that amount of time on Iverson's case. A rational fair minded person could believe that Mr. Havirco spent 40 to 50 hours on Iverson's case given the explanation from Mr. Havirco of the time spent and relative simplicity of the cases he handled for his municipal court contracts. 1RP 109-116.

Mr. Havirco employed the services of a highly experienced private investigator to aid in the preparation of Iverson's case. 1RP

85, 2RP 40-41; CP 37-38. Together they interviewed the key witnesses for the State. 1RP 122-23, 2RP 41-42. An attorney is not required to interview every witness on the State's witness list before formulating an opinion regarding the strength of the State's case. Mr. Havirco knew that K.S.I. would be **the** key witness for the State and it was her testimony the jury would be the most interested in hearing. Mr. Havirco made a tactical decision not to ask K.S.I. about discrepancies in her statements, preferring not to tip his hand as to what his strategy would be at trial. 2RP 46-48. Further, Mr. Armstrong testified that he had been prepared to speak to other witnesses if that was determined to be necessary if the case proceeded to trial. 2RP 44. Mr. Havirco told Iverson it was Iverson's decision whether or not he wanted to plead guilty or take the case to trial and Mr. Havirco was prepared and ready to take the case to trial. 2RP 19-20. Iverson also testified that Mr. Havirco told him it was ultimately up to Iverson whether or not to proceed to trial or plead guilty. 1RP 41. There was sufficient evidence presented to the trial court that Mr. Havirco adequately prepared and investigated Iverson's case.

Mr. Havirco spent, at a minimum, 45 minutes going over the SDPG, the sex offender registration appendix and the State's offer

with Iverson. 2RP 22, 36; Ex. 10. Mr. Havirco went line by line through the SDPG. 2RP 22, 36. Mr. Havirco informed Iverson of all the direct and collateral consequences of pleading guilty, including information about the ISRB. 1RP 96, 2RP 15, 17-18, 36-37. While Iverson refutes that Mr. Havirco did any of this, his signature on the SDPG and his colloquy with the trial court judge at the time the plea was taken indicates otherwise. 1RP 3-11; CP 48-61. This is substantial evidence that Iverson was fully informed of his rights and the consequences of pleading guilty.

There was substantial evidence presented to the trial court for every finding of fact entered by the trial court as argued in this section and the previous sections of this response. Iverson's arguments to the contrary are without merit and his guilty plea and sentence should be upheld.

4. Iverson Did Not Make The Requisite Showing That His Guilty Plea Should Be Withdrawn To Correct A Manifest Injustice.

Iverson does not have an absolute right to withdraw his guilty plea. Iverson, as any defendant attempting to withdraw his or her plea, must meet the strict requirements of CrR 4.2(f). Iverson was unable to meet his burden and the trial court correctly ruled

that Iverson's guilty plea could not be withdrawn because there was not a manifest injustice.

There is no constitutional right to withdraw a guilty plea. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). Under the criminal court rules "[t]he court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). The defendant bears the burden of proving manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283-4, 916 P.2d 405, 408 (1996). Due to the numerous safeguards in place surrounding a defendant's plea of guilty, the manifest injustice standard is a demanding one. *State v. Arnold*, 81 Wn. App. 379, 385, 914 P.2d 762 (1996), *review denied*, 130 Wn.2d 1003, 925 P.2d 989 (1996). Manifest injustice is defined as "obvious, directly observable, overt, not obscure." *Id.* A motion to withdraw a guilty plea "is addressed to the sound discretion of the court." *State v. Olmsted*, 70 Wn.2d at 118. A trial court's denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. *Id.* "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State*

v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

As argued above there was substantial evidence presented to the trial court regarding Mr. Havirco's effective representation of Iverson. The colloquy the trial court judge went through with Iverson during his guilty plea coupled with the SDPG are competent and substantial evidence that Iverson made a knowing, voluntary and intelligent decision to plead guilty after being told of the direct and indirect consequences of pleading guilty. *See* 1RP 3-11; CP 48-61. While Iverson presented evidence contradicting Mr. Havirco and Mr. Armstrong's version of the events, the trial court is not required to find Iverson or his witnesses credible. *See State ex. rel. Lige v. County of Pierce*, 65 Wn. App. at 618. Given the evidence presented to the trial court from the witnesses, the written plea from signed by Iverson and the transcript of the plea hearings, which was reviewed by the trial court prior to its ruling on Iverson's motion, the trial court did not abuse its discretion when it denied Iverson's motion to withdraw his guilty plea.[18] The trial court's ruling was not based on unreasonable or untenable grounds or

[18] The trial court went through portions of the transcript on the record when making its ruling. *See* SRP 3-5.

reasons. Therefore this Court should affirm the trial court's ruling denying the motion to withdraw the guilty plea.

IV. CONCLUSION

For the foregoing reasons, this court should affirm the trial court's ruling denying Iverson's motion to withdraw his guilty plea and affirm Iverson's convictions for two counts of rape of a child in the first degree - domestic violence.

RESPECTFULLY submitted this 19th day of June, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

June 19, 2012 - 4:13 PM

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